

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

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In re : **Chapter 11**

:

SOUTHERN AIR : **Case No. 12-12690 (CSS)**

HOLDINGS, INC., et al., :

: **Jointly Administered**

Debtors.¹ :

: **Re: Docket Nos. 470, 612, 613, 614 & 627**

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DEBTORS’ OMNIBUS RESPONSE TO OBJECTIONS TO CONFIRMATION OF THE SECOND AMENDED JOINT PLAN OF AFFILIATED DEBTORS PURSUANT TO CHAPTER 11 OF THE UNITED STATES BANKRUPTCY CODE

Southern Air Holdings, Inc. (“Holdings”) and its affiliated debtor entities, as debtors and debtors in possession (collectively, the “Debtors”), respectfully represent as follows:²

Jurisdiction

1. This Court has jurisdiction to consider this matter pursuant to 28 U.S.C. §§ 157 and 1334, and the *Amended Standing Order of Reference from the United States District Court for the District of Delaware*, dated as of February 29, 2012. This is a core proceeding pursuant to 28 U.S.C. § 157(b). Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

¹ The Debtors in these cases, along with the last four digits of each Debtor’s federal tax identification number, are: (i) Southern Air Holdings, Inc., 6605; (ii) Cargo 360, Inc., 4233; (iii) Southern Air Inc., 2187; (iv) Air Mobility Inc., 3824; (v) 21110 LLC, 3761; (vi) 21111 LLC, 8100; (vii) 21221 LLC, 1567; (viii) 21550 LLC, 8103; (ix) 21576 LLC, 6341; (x) 21590 LLC, 8105; (xi) 21787 LLC, 0617; (xii) 21832 LLC, 7893; (xiii) 23138 LLC, 7192; (xiv) 24067 LLC, 6360; (xv) 46914 LLC, 0322; (xvi) Aircraft 21255, LLC, 5500; (xvii) Aircraft 21380, LLC, 1753; and (xviii) CF6-50, LLC, 9733. The address for all Debtors is 117 Glover Avenue, Norwalk, Connecticut 06850.

² All capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the *Debtors’ Second Amended Joint Plan of Affiliated Debtors Pursuant to Chapter 11 of the United States Bankruptcy Code*.



Background

2. On the Petition Date, each of the Debtors commenced with this Court a voluntary case under chapter 11 of the Bankruptcy Code. The Debtors continue to operate their businesses and manage their properties as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. The Debtors' chapter 11 cases have been consolidated for procedural purposes only and are being jointly administered pursuant to Bankruptcy Rule 1015(b).

3. On November 21, 2012, the Office of the United States Trustee for the District of Delaware (the "U.S. Trustee") filed a notice [Docket No. 293] appointing a statutory committee of unsecured creditors pursuant to section 1102 of the Bankruptcy Code. No trustee or examiner has been appointed in these chapter 11 cases.

4. On January 18, 2013, the Debtors filed the *Second Amended Joint Plan of Affiliated Debtors Pursuant to Chapter 11 of the United States Bankruptcy Code* [Docket No. 470] (the "Plan") and the *Disclosure Statement for the Second Amended Joint Plan of Affiliated Debtors Pursuant to Chapter 11 of the United States Bankruptcy Code* [Docket No. 472] (the "Disclosure Statement").

5. On January 29, 2013, the Bankruptcy Court held a hearing at which it approved the Disclosure Statement and entered an order with respect thereto [Docket No. 518] (the "Disclosure Statement Order"). Pursuant to the Disclosure Statement Order, the Bankruptcy Court, (i) established certain solicitation and voting procedures with respect to the Plan; (ii) established as March 1, 2013 as the deadline to file objections, if any, to confirmation of the Plan; and (iii) scheduled the Confirmation Hearing for March 14, 2013.

Objections to the Plan

6. Following the entry of the Disclosure Statement Order, certain parties interposed objections to confirmation of the Plan (the “Objections”). The Debtors received Objections from the following parties: (i) The Los Angeles County Treasurer and Tax Collector (“LA County”) [Docket No. 612]; (ii) The United States of America, on behalf of its Internal Revenue Service (the “IRS”) [Docket No. 613]; (iii) The U.S. [Docket No. 614]; and (iv) The United States of America (the “United States”) [Docket No. 627].

Omnibus Response to Objections

7. Annexed hereto as Exhibit A is a chart summarizing the Objections and the Debtors’ responses thereto (the “Omnibus Response Chart”). For the reasons stated in the Omnibus Response Chart and in the *Memorandum of Law in Support of Confirmation of the Second Amended Joint Plan of Affiliated Debtors Pursuant to Chapter 11 of the United States Bankruptcy Code* (the “Confirmation Brief”), filed contemporaneously herewith, the Debtors submit that the Objections should be overruled in their entirety.³ As more fully set forth in the Confirmation Brief, the Debtors believe that the Plan complies with and satisfies all of the applicable requirements under section 1129 of the Bankruptcy Code. Accordingly, the Debtors respectfully request that the Bankruptcy Court confirm the Plan.

³ Failure of the Debtors to address other assertions made in the Objections does not constitute a waiver of the Debtors’ rights to object to such assertions at the Confirmation Hearing. The Debtors deny many of the factual and legal assertions and characterizations contained in the Objections. Nothing contained herein shall be deemed an admission or acceptance of any statement contained in the Objections.

WHEREFORE the Debtors respectfully request entry of an order (i) overruling the Objections; (ii) confirming the Plan; and (iii) granting the Debtors such other and further relief as the Bankruptcy Court may deem just and appropriate.

Dated: March 11, 2013
Wilmington, Delaware

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Debtors in Possession*

Exhibit A

Omnibus Response Chart

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| 1. Objection of LA County | |
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| [Docket No. 612] | |
| <u>Objection</u> | <u>Response</u> |
| LA County objected on the following grounds: | |
| <p>A. Section 3.2(b) of the Plan violates section 511 of the Bankruptcy Code because it fails to specify that the Debtors will pay certain penalty and interest amounts applicable to LA County’s Priority Tax Claim under California state law, in violation of Section 511 of the Bankruptcy Code. Accordingly, the LA County proposes that the language in Section 3.2 of the Plan should be modified to reflect the language in Section V.A.2 of the Disclosure Statement. [¶¶ 9, 10].</p> | <p>A. Section 511 of the Bankruptcy Code provides that interest on tax claims shall be calculated at “the rate determined under applicable non-bankruptcy law” and “determined as of the calendar month in which the plan is confirmed.” 11 U.S.C. § 511. Section 506(b) of the Bankruptcy Code permits over-secured claimants to accrue interest, and any reasonable fees costs or charges provided for under the statute that gives rise to such claim. 11 U.S.C. § 506(b).</p> <p>Section 3.2 of the Plan provides that Allowed Priority Tax Claims may, at the Debtors’ option, be satisfied “in full, in Cash, in equal quarterly installments ... <i>together with interest accrued thereon at the applicable non-bankruptcy rate as of the Confirmation Date.</i>” (emphasis added). Accordingly, the Debtors submit that (i) the Plan is consistent with the Bankruptcy Code and (ii) to the extent that the delinquent penalty, redemption interest, and accrued interest and penalties are all consistent with applicable non-bankruptcy law, Section 3.2 of the Plan provides that such payments will be made.</p> <p>Moreover, the prior addition of language to the Disclosure Statement to make clear that state law is included within the meaning of “applicable nonbankruptcy law,” disclosed to holders of Priority Tax Claims that state law shall be considered when calculating such claims. No further modifications to the Plan are necessary.</p> |

| 1. Objection of LA County | |
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| [Docket No. 612] | |
| <u>Objection</u> | <u>Response</u> |
| <p>B. Section 7.1(d)(ii) of the Plan violates Section 511 of the Bankruptcy Code by failing to specify that the rate of interest applicable to LA County’s secured tax claim and secured real property tax claim is the rate of interest “as calculated under applicable state law.” [¶ 12].</p> | <p>B. Section 7.1 of the Plan, provides, in relevant part, that the “Holders of Allowed Other Secured Claims shall receive . . . (d) such other distributions as shall be necessary to satisfy the requirements of chapter 11 of the Bankruptcy Code, including, without limitation, the payment of interest with respect thereto, at the lesser of . . . (ii) <i>the rate applicable pursuant to applicable non-bankruptcy law.</i>” (emphasis added). Accordingly, the Debtors submit that Section 7.1(d)(ii) of the Plan clearly specifies that the interest rate will be calculated in accordance with applicable non-bankruptcy law, which includes state law. For purposes of clarity, however, the Plan has been modified by inserting the words “and otherwise calculated” in clause (d)(ii) thereof following the word “applicable.” No further modifications to the Plan are necessary.</p> |

| 2. Objection of the IRS | |
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| [Docket No. 613] | |
| <u>Objection</u> | <u>Response</u> |
| The IRS objected on the following grounds: | |
| A. The third party, non-debtor limitation of liability, exculpation, injunction, and release provisions set forth in Article III of the Plan may be impermissible. Specifically, the IRS asserts that Section 31.11 of the Plan “appears to be dueling” with Section 31.6(a) of Plan, which provides for certain protections in accordance with the Anti-Injunction Act, I.R.C. Section 7321(a). [¶ 4]. | A. The Plan has been modified to make clear that Section 31.11 of the Plan is subject to Section 31.6 of the Plan. Specifically, Section 31.11 of the Plan has been modified by (a) deleting the words “Notwithstanding anything contained herein to the contrary” at the beginning thereof and (b) inserting the words “Except as otherwise provided in the Plan or the Confirmation Order” in lieu thereof. No further modifications to the Plan are necessary. |

| 2. Objection of the IRS | |
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| [Docket No. 613] | |
| <u>Objection</u> | <u>Response</u> |
| <p>B. To the extent that Section 1.2 of the Plan (defining an Administrative Expense Claim) is intended to set a bar date for Section 503(b)(1)(B) and (C) administrative expense claims, it is in violation of Section 503(b)(1)(D) of the Bankruptcy Code. [¶ 5].</p> | <p>B. Section 503(b)(1)(D) of the Bankruptcy Code provides, in relevant part, that “notwithstanding the requirements of [section 503(a)], a governmental unit shall not be required to file a request for the payment of an expense described in [Section 503(b)(1)(B) or 503(b)(1)(C)], as a condition of its being an allowed administrative expense.” 11 U.S.C. § 503(b)(1)(D). Section 1.2 of the Plan provides that an Administrative Expense Claim is “any Claim arising on or prior to the Effective Date constituting a cost or expense of administration of the Chapter 11 Cases asserted or authorized to be asserted, on or prior to the date <i>established by the Bankruptcy Court in the Confirmation Order</i> as the last day for filing proofs of Administrative Expense Claims, <i>in accordance with section 503(b) . . . of the Bankruptcy Code.</i>” (emphasis added).</p> <p>The Debtors agree that <i>in accordance with Section 503(b)</i> of the Bankruptcy Code, holders of Section 503(b)(1)(B) and (C) administrative expense claims are not required to file a proof of claim. Thus, Section 1.2 of the Plan does not establish a bar date for administrative expense claims to the extent not allowed by Section 503(b).</p> <p>Similarly, the Debtors submit that, although Paragraph 31 of the Confirmation Order establishes the deadline to file proof of Administrative Expense Claims, in accordance with Section 1.2 of the Plan and Section 503(b) of the Bankruptcy Code, Paragraph 31 of the Confirmation Order does not establish a bar date for Section 503(b)(1)(B) and (C) administrative expense claims.</p> |

| 2. Objection of the IRS | |
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| [Docket No. 613] | |
| <u>Objection</u> | <u>Response</u> |
| <p>C. Section 1.6 of the Plan fails to provide for payment of interest on the IRS’s administrative expense claims as allowed by Section 503(b)(1)(C). [¶ 6].</p> | <p>C. The Plan has been modified to make clear that the Debtors intend to provide for payment of administrative expense claims to the extent allowed by Section 503(b). Specifically, Section 1.2 of the Plan, entitled “<i>Administrative Expense Claim</i>” is modified by inserting the following sentence at the conclusion thereof:</p> <p style="padding-left: 40px;">"Notwithstanding the foregoing, with respect to the items referred to in clauses (a) through (c) above, and to the extent permitted by applicable non-bankruptcy law or the documents and instruments related thereto, "Administrative Expense Claim" shall include interest, penalties, or late charges arising from or relating to the period from the Petition Date up to and including the Effective Date."</p> <p>No further modifications to the Plan are required.</p> |

| 2. Objection of the IRS | |
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| [Docket No. 613] | |
| <u>Objection</u> | <u>Response</u> |
| <p>D. Article XXVI of the Plan provides for retention of exclusive jurisdiction over matters involving the IRS. [¶ 7].</p> | <p>D. The Debtors submit that Article XXVI accurately provides for retention of exclusive jurisdiction over matters involving the IRS. The Third Circuit has held that post-confirmation jurisdiction exists where there is a “close nexus” to the bankruptcy plan or proceedings. <i>Binder v. Price Waterhouse & Co., LLP (In re Resorts Int’l, Inc.)</i>, 372 F.3d 154, 162 (3d Cir. 2004). Thus, by providing that the Bankruptcy Court retain jurisdiction, the Plan does not create jurisdiction, rather, it merely states that the Bankruptcy Court will <i>retain</i> any jurisdiction it may have. Moreover, providing that the Bankruptcy Court will retain jurisdiction does not preclude a party from requesting that a case be heard in a different court. Accordingly, the Debtors submit that Article XXVI of the Plan is appropriate and consistent with applicable law.</p> |

| 3. Objection of the United States Trustee | |
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| [Docket No. 614] | |
| <u>Objection</u> | <u>Response</u> |
| <p>The U.S. Trustee objected, claiming that:</p> <p>A. The exculpation provisions contained in Section 31.8 of the Plan are overbroad and impermissible. Specifically, the list of parties receiving exculpation should be limited to those parties who served in the capacity of estate fiduciaries, <i>i.e.</i> estate professionals and the Debtors' directors and officers. [¶¶ 9–11].</p> | <p>A. As discussed more fully in the Confirmation Brief, the standard within the Third Circuit for approving exculpation provisions in a plan of reorganization provides that they are appropriate when the protection is necessary and given in exchange for fair consideration. Conf. Brief ¶ 54; <i>see In re Continental Airlines</i>, 203 F.3d 203, 211–14 (3d Cir. 2000).</p> <p>The exculpation provision set forth in Section 31.8 of the Plan (i) exculpates only those entities that have significantly contributed to the Debtors' reorganization; (ii) is a necessary component of the Debtors' negotiations with key constituents; and (iii) is limited to claims connected with, or arising out of, these reorganization cases. Accordingly, such provision is appropriate and consistent with the applicable law of this District. Indeed, this Court and others within this District have granted exculpations to entities similar to the Released Parties. Conf. Brief ¶ 58; <i>see In re NewPage Corp.</i> Case No. 11-12804 (KG) (Bankr. D. Del. Dec. 14, 2012) [Docket No. 2945]; <i>In re Constar Int'l</i>, Case No. 11–10109 (CSS) (Bankr. D. Del. May 20, 2011) [Docket No. 439]; <i>In re Leslie Controls, Inc.</i>, 2010 Bankr. LEXIS 3729, at *66 (Bankr. D. Del. Oct. 29, 2010); <i>In re Premier Int'l Holdings, Inc.</i>, 2010 LEXIS 5397, at *26 (Bankr. D. Del. Apr. 29, 2010); <i>In re ACG Holdings</i>, Case No. 08-11467 (CSS) (Bankr. D. Del. Aug. 26, 2008) [Docket No. 155].</p> |

| 4. Objection of the United States | |
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| [Docket No. 627] | |
| <u>Objection</u> | <u>Response</u> |
| <p>The United States objected on the following grounds:</p> <p>A. Sections 1.6 and 31.1(a) of the Plan seek to preclude recovery of interest on administrative claims. [¶ 4].</p> <p>B. Section 1.154 of the Plan seeks to automatically subordinate claims filed after the Bar Date in violation of Bankruptcy Rule 9006(b), which provides the United States with an opportunity to file a claim after the Bar Date if the failure to file was “the result of excusable neglect.” [¶ 5].</p> <p>C. Article XXVI of the Plan provides for the retention of exclusive jurisdiction over matters involving the United States and its agencies. [¶ 6].</p> <p>D. The supplemental injunction provision in Section 31.11 of the Plan creates ambiguity with regard to the rights of the United States as set forth in Section 31.6(a) of the Plan. [¶ 7].</p> | <p>A. The Plan has been modified to make clear that the Debtors intend to provide for payment of administrative expense claims to the extent allowed by Section 503(b). <i>See supra</i> Section 2C. No further modifications to the Plan are necessary.</p> <p>B. The Debtors submit that the United States misreads Section 1.154 of the Plan. Specifically, Section 1.154 of the Plan provides that a “Subordinated Claim” includes any Claim proof of which was filed on or after the date “<i>designated by the Bankruptcy Court or established by the Bankruptcy Code</i> as the last date for filing such proof of claim” (emphasis added). Bankruptcy Rule 9006(b) provides that the United States may file a claim after the Bar Date if failure to file was “the result of excusable neglect.” Insofar as the United States files a proof of claim in accordance with Bankruptcy Rule 9006(b), such proof of claim is not a late filed claim under the Plan and, therefore, not a Subordinated Claim.</p> <p>C. As detailed in Section 2D herein, the Debtors submit that Article XXVI of the Plan is appropriate and consistent with applicable law. <i>See supra</i> Section 2D.</p> <p>D. The Plan has been modified to make clear that Section 31.11 of the Plan is subject to Section 31.6 of the Plan. <i>See supra</i> Section 2A. No further modifications to the Plan are necessary.</p> |